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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

GILBERT ARIAS, JR.,

Defendant and Appellant.

B206177

(Los Angeles County
Super. Ct. No. KA080148)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Wade Olson, Judge. Affirmed in part; dismissed in part.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and
Appellant.

No appearance for Plaintiff and Respondent.

On August 11, 2007 Chairag Dayal was pumping gas into his car when Gilbert Arias, Jr. attacked him and attempted to divert the gas into his own car. Dayal fought back; Arias drove off, followed by Dayal, who telephoned police.

Arias then went to a restaurant, where he encountered Beth Valdovinos and Angel Delamo in the parking lot. Arias brandished a gun and took Valdovinos's purse. He struck Delamo in the face. When Delamo collapsed, Arias fled in his car.

Police officers called to the scene pursued Arias in a high-speed chase that ended in a parking lot. The officers took Arias into custody.

On September 11, 2007 Arias was charged by information with attempted second degree robbery (Dayal) (Pen. Code, §§ 211, 664)¹ (count 1), second degree robbery (Valdovinos) (§ 211) (count 2), assault with a deadly weapon (Delamo) (§ 245, subd. (a)(1)) (count 3) and feloniously evading a pursuing police officer (Veh. Code, § 2800.2, subd. (a)) (count 4). The information specially alleged as to all counts that Arias had suffered convictions for burglary in 2002 and attempted robbery in 2006, serious felonies within the meaning of section 667, subdivision (a)(1), and serious or violent felonies within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). It also alleged he had previously served two separate prison terms for felony convictions (§ 667.5, subd. (b)).

Arias was represented by appointed counsel. On October 22, 2007 the People and Arias agreed Arias would plead no contest to robbery (count 2) and admit the 2006 attempted robbery conviction both as a prior strike and as a section 667, subdivision (a), enhancement in return for a state prison sentence of 11 years. However, because Arias asserted his 2006 conviction, based upon a no contest plea, was invalid on constitutional or other grounds, the prosecutor also agreed, if Arias established the invalidity of the 2006 conviction as a sentencing enhancement, he would be sentenced to five years in

¹ Statutory references are to the Penal Code unless otherwise indicated.

state prison rather than the agreed-to term of 11 years.² Arias stated he understood these terms of his plea agreement.

At the time Arias entered his plea, he was orally advised of his constitutional rights and the nature and consequences of his plea.³ The prosecutor reiterated Arias could be committed to state prison for 11 or five years depending on the results of the defense investigation into the validity of his 2006 conviction. Arias stated he understood and accepted the terms of the bargain.

In accordance with the negotiated agreement, Arias pleaded no contest to count 2 and admitted the 2006 conviction as a prior strike and as a section 667, subdivision (a), enhancement. Defense counsel joined in the waivers of Arias's constitutional rights and concurred in the plea and admission. The trial court expressly found Arias's waivers, plea and admission were voluntary, knowing and intelligent. The court found, and defense counsel stipulated to, a factual basis for Arias's plea and admission. The court continued the matter for sentencing until defense counsel had completed his investigation into the validity of the 2006 conviction.

On November 6, 2007 Arias appeared with retained counsel, and his appointed counsel was relieved as attorney of record. His motion to continue the sentencing hearing was granted.

At the January 8, 2008 sentencing hearing, Arias, through retained counsel, filed a Motion To Sentence Defendant Without Imposing Strike Enhancement. The motion asserted: (1) before pleading no contest to attempted robbery in 2006, Arias was not informed by either defense counsel or the trial court that he was pleading to a strike offense; (2) although Arias initialed a box on the plea form indicating he was aware the plea was to a serious or violent felony, Arias did not recall or understand what that

² The upper term for second degree robbery is five years.

³ Arias claimed his poor eyesight prevented him from completing a written plea form, and the parties agreed Arias would be orally advised of his constitutional rights and the nature and consequences of his plea.

meant; and (3) if Arias had known his plea was to a strike offense, he would not have accepted the plea bargain. The motion also asserted, when Arias was released on parole, he received a document showing his strike status as “N/A” or not applicable. After argument by counsel, the trial court denied the motion.

The trial court sentenced Arias to state prison for the 11-year maximum term specified in the plea agreement (the middle term of three years for second degree robbery, doubled under the Three Strikes law, plus a five-year enhancement under section 667, subdivision (a)). Arias received presentence custody credit of 226 days (151 actual days and 75 days of conduct credit). The court ordered Arias to pay a \$20 security assessment, a \$10 crime prevention fund fine and a \$200 restitution fine. A parole revocation fine was imposed and suspended pursuant to section 1202.45. The remaining counts and special allegations were dismissed on the prosecutor’s motion.⁴

Arias timely filed a notice of appeal. In a request for a certificate of probable cause, Arias claimed he was not advised in connection with his 2006 no contest plan that he would face the possibility of enhanced punishment in the event of a future conviction. Arias’s request for a certificate of probable cause was denied. We appointed counsel to represent him on appeal.

After examination of the record counsel filed an opening brief in which no issues were raised. Pursuant to *People v. Wende* (1979) 25 Cal.3d 436, counsel asked this court to independently review the entire record on appeal for arguable issues.

On July 22, 2008 we advised Arias he had 30 days within which to personally submit any contentions or issues he wished us to consider. On August 22, 2008 Arias filed a handwritten supplemental brief in which he seeks reversal of both the doubling of his three-year base term pursuant to the Three Strikes law and imposition of a five-year prior serious felony conviction enhancement. Arias argues his admission of the 2006

⁴ The trial court also found Arias in violation of probation in Los Angeles Superior Court case No. 5JM08937, revoked and terminated probation in that case, and sentenced him to 226 days in county jail, with credit for time served.

conviction for the purpose of enhancing his negotiated sentence in this case was invalid due to an inadequate advisement of constitutional rights (see *In re Yurko* (1974) 10 Cal.3d 857, 863).⁵ He also contends, prior to entering his plea in 2006, he was not advised he would face the possibility of enhanced punishment under the Three Strikes law or section 667, subdivision (a), as a result of his 2006 conviction if he was convicted of another serious crime in the future. Arias urges his sentence be modified to the three-year middle term for second degree robbery.

“A defendant who has pleaded guilty or nolo contendere to a charge in the superior court, and who seeks to take an appeal from a judgment of conviction entered thereon, may not obtain review of so-called ‘certificate’ issues, that is questions going to the legality of the proceedings, including the validity of his plea, unless he has complied with section 1237.5 of the Penal Code and the first paragraph of rule 31(d) [now rule 8.304(b)] of the California Rules of Court -- which require him to file in the superior court a statement of certificate grounds as an intended notice of appeal within 60 days after rendition of judgment, and to obtain from the superior court a certificate of probable cause for the appeal within 20 days after filing of the statement and, hence, within a maximum of 80 days after rendition of judgment.” (*People v. Mendez* (1999) 19 Cal.4th 1084, 1088, fns. omitted.)

Having failed to obtain a certificate of probable cause, Arias may only seek review on appeal of so-called noncertificate issues -- “postplea questions not challenging his plea’s validity and/or questions involving a search or seizure whose lawfulness was contested pursuant to [Penal Code] section 1538.5.” (*People v. Mendez, supra*, 19 Cal.4th at p. 1088; see Cal. Rules of Court, rule 8.304(b)(5) [“[i]f the defendant’s notice of appeal contains a statement under (4) [that the appeal is based on the denial of a motion to suppress evidence under § 1538.5 or grounds that arose after entry of the plea

⁵ *Yurko* error occurs when a court fails to “advise the defendant and obtain waivers of (1) the right to a trial to determine the fact of the prior conviction, (2) the right to remain silent, and (3) the right to confront adverse witnesses.” (*People v. Mosby* (2004) 33 Cal.4th 353, 356.)

and do not affect the plea's validity], the reviewing court will not consider any issue affecting the validity of the plea unless the defendant also complies with (1) [by obtaining a certificate of probable cause"].) "Exempt from this certificate requirement are postplea claims, including sentencing issues, that do not challenge the validity of the plea. [Citations.] For example, 'when the claim on appeal is merely that the trial court abused the discretion the parties intended it to exercise, there is, in substance, no attack on a sentence that was "part of [the] plea bargain." [Citation.] Instead, the appellate challenge is one contemplated, and reserved, by the agreement itself.'" (*People v. Cuevas* (2008) 44 Cal.4th 374, 379.)

Arias's first claim of *Yurko* error implicates the validity of his admission of his 2006 conviction as part of the negotiated plea in the present case. His challenge to this aspect of his plea agreement is a certificate issue, which does not survive his failure to obtain a certificate of probable cause. Even if it did, the distinguishing factor in *Yurko* was "the prior conviction and the current substantive offense to which the prior conviction related were each addressed in separate proceedings. In *Yurko*, the defendant admitted the prior convictions, on the advice of his attorney, before the start of a jury trial on a burglary charge. There is nothing in *Yurko* . . . which requires a separate advisement and waiver of rights, where, as here, defendant in a single proceeding pleads guilty to a current charge and also admits that he suffered prior convictions." (*People v. Forrest* (1990) 221 Cal.App.3d 675, 679, fns. omitted.)

Arias's second claim challenges the trial court's denial at sentencing of what amounted to a motion to strike his 2006 robbery conviction on the ground he was not advised a possible consequence of his no contest plea was its use to enhance his punishment if he were to commit another felony in the future.⁶ Arias is correct that a defendant must be advised of the direct consequences of the conviction before entering a guilty or no contest plea. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605.) A

⁶ Arias does not suggest his 2006 robbery conviction does not qualify as either a prior strike or a serious felony with the meaning of section 667, subdivision (a).

consequence is deemed “direct” if it follows inexorably from the plea and has a definite, immediate and largely automatic effect on the range of the defendant’s punishment. (*People v. Barella* (1999) 20 Cal.4th 261, 270; *People v. Moore* (1998) 69 Cal.App.4th 626, 630.) “[P]ossible future use of a current conviction is not a direct consequence of the conviction.” (*People v. Bernal* (1994) 22 Cal.App.4th 1455, 1457 [future use of a conviction as a § 667, subd. (a), enhancement is not a direct consequence requiring advisement]; see *People v. Gurule* (2002) 28 Cal.4th 557, 634.) Accordingly, “[a] defendant need not be advised of the possible future use of a conviction in the event the defendant commits a later crime.” (*Bernal*, at p. 1457; *People v. Sipe* (1995) 36 Cal.App.4th 468, 479 [future use of a conviction as a strike is not a direct consequence requiring advisement].) The trial court did not abuse its direction in denying Arias’s motion to strike his 2006 robbery conviction for purposes of sentencing.

We have examined the entire record and are satisfied Arias’s attorney has fully complied with the responsibilities of counsel and no arguable issues exist. (*Smith v. Robbins* (2000) 528 U.S. 259, 277-284 [120 S.Ct. 746, 145 L.Ed.2d 756]; *People v. Kelly* (2006) 40 Cal.4th 106; *People v. Wende*, *supra*, 25 Cal.3d at p. 441.) As to Arias’s claim of *Yurko* error, because he pleaded no contest and failed to obtain a certificate of probable cause as required by section 1237.5 and California Rules of Court, rule 8.304(b), his notice of appeal is inoperative and his appeal must be dismissed. As to his appeal from the court’s denial of his motion to strike his 2006 conviction, the judgment is affirmed.

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PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.